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ADMINISTRATIVE RULE-MAKING AND THE COURTS

EUGENE J. KEEFE†

GOVERNMENT through the medium of administrative agencies is not new. In England, during the reign of Henry VIII, the Statute of Sewers¹ was enacted, which set up a governing commission. That the administrative method of controlling human activity has steadily increased in England is demonstrated by reports² and text books³ containing data upon the subject. Our own Interstate Commerce Commission is over fifty-two years old.⁴ Indeed, allowance of customs payments was controlled by an agency almost one hundred years before the Interstate Commerce Commission was created.⁵ Since the creation of the latter Commission this country has witnessed a tremendous increase in the number of governmental agencies operating under delegated authority.⁶ Despite the length of our experience and the steadily increasing frequency with which we resort to creating commissions, we are, to a large extent, still in the groping stage.⁷ One of the dark areas is found in the field contemplated by the question—to what extent should our courts supervise the actions of our administrative agencies? There are two schools of thought: first, those who believe that personal and property rights of individuals should be protected by our courts, even if the speed and efficiency of administrative agencies are impaired;⁸ second, those who contend that the expert agency is far better qualified

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The writer contemplates an accompanying article in an early issue entitled, "Administrative Adjudication and the Courts."

1. 23 Hen. VIII, c. 5 (1531).

2. See REPORT OF THE COMMITTEE ON MINISTERS' POWERS (1932) Cmd 4060.

3. See ROBSON, *JUSTICE AND ADMINISTRATIVE LAW* (1928); HEWART, *THE NEW DESPOTISM* (1929).

4. The Interstate Commerce Commission was created on February 4, 1887.

5. See 1 Stat. 29, c. 32 (1789).

6. It has been estimated that there are over 600 federal administrative agencies alone.

7. Feller, *Prospectus for the Further Study of Federal Administrative Law* (1938) 47 YALE L. J. 647.

8. Pound, *Administrative Application of Legal Standards* (1919) 44 A. B. A. REP. 445, 462; Vanderbilt, *The Place of the Administrative Tribunal in our Legal System* (1938) 24 A. B. A. J. 267.

than the inexpert court, and, moreover, that any supervision by the latter is bold usurpation without constitutional basis.⁹ Those in the first school are called fundamentalists or constitutionalists, but their more aggressive opponents call them reactionaries or devotees of a *laissez faire* policy. Those in the second school claim to be progressives, but those who disagree with them place tags of radicalism, or more gently, of realism, upon them.

To state the question generally or to place the opposing writers in general categories doesn't assist very much in attempting to arrive at a solution.¹⁰ It is essential that we break down the larger problem into smaller issues and discuss each one separately, if we are to arrive at any actionable knowledge. It is proposed in this paper to discuss administrative rule-making as distinguished from administrative adjudication.¹¹ In other words, the subject contemplated is the degree of control by our courts over agencies exercising quasi-legislative functions, that is, over agencies who regulate rather than decide. The other type of administrative function, often called the quasi-judicial function, will be referred to only for comparative purposes. The distinction between the two functions is sometimes questioned because of one agency at different times exercising each function, and in close cases there is the difficulty of ascertaining whether a particular action is quasi-judicial or quasi-legislative.¹² It certainly is not accurate to say that the function of the agency is quasi-judicial when a hearing has been held, because hearings are very often granted before a rule or regulation is enacted by an administrative agency. Hearings are granted by the Interstate Commerce Commission in equipment and rate questions prior to the issuance of regulations on these matters. Conversely, it is not accurate to state that the function of an administrative agency is quasi-legislative because no hearing has been held. In the defective food cases, the agency may, under the police power, decide that certain food be destroyed, and this decision, in the interest of public health, may be reached without affording a hearing to the owner.¹³ Certainly this

9. Cooper, *Administrative Justice and the Role of Discretion* (1938) 47 YALE L. J. 577, 594, 595; Landis, *Administrative Policies and the Courts* (1938) 47 YALE L. J. 519, 529-531.

10. Feller, *supra* note 7, at 674.

11. See BLACHLY & OATMAN, *ADMINISTRATIVE LEGISLATION AND ADJUDICATION* (1934).

12. See Fuchs, *PROCEDURE IN ADMINISTRATIVE RULE-MAKING* (1938) 52 HARV. L. REV. 259, 262-4.

13. *North American Storage Co. v. Chicago*, 211 U. S. 306 (1908). The court wrote, "We are of the opinion, however, that a provision for a hearing before seizure and condemnation and destruction of food which is unwholesome and unfit for use, is not necessary." *Id.* at 315. *Lawton v. Steele*, 152 U. S. 133 (1894); *Miller v. Horton*, 152 Mass. 540 (1891).

function is not legislative. It is suggested that the function is quasi-judicial when the action of the agency is based upon facts adduced in evidence which is followed by an order or decision which will have no future effect generally; whereas the function is quasi-legislative when an order or regulation issues having future application.¹⁴ This states a fair line of distinction. But probably a better statement of the true distinction is the following: If the regulation or determination contemplates "indicated but unnamed and unspecified persons or situations", it is quasi-legislative; but if the finding or decision contemplates "named or specified persons or situations", it is quasi-judicial.¹⁵

Having confined our subject to the extent of judicial control over administrative agencies in their quasi-legislative or rule-making function, it now becomes necessary to further break down the problem within this subject matter. Probably the best analysis lies in considering separately the points of contact between administrative boards and the courts, that is, at what points have the courts stepped in to consider the validity of the regulation? A comprehensive view of the cases indicates that the courts have supervised administrative regulation at three main points. The courts have intervened to ascertain (1) the validity of the statute which creates the administrative agency, (2) the validity of the administrative regulation, and (3) the procedure in enacting the regulation. It is now proposed to examine these points of judicial supervision and briefly discuss whether our courts, particularly our Supreme Court, have usurped power or unnecessarily impaired efficiency in our administrative bodies in their zeal to protect personal and property rights of individuals and corporations.

The Validity of the Creating Statute

On this basic question as to the validity of the creating statute, have our courts exercised a proper restraint in supervising this portion of the administrative process? Have our courts usurped power?

At the outset we encounter the rule that the creating statute must contain a norm or standard to guide the created administrative agency.¹⁶ This means that the agency may make detailed rules and regulations within the prescribed field, the theory being that the legislature, state or federal, makes the general law in the statute and the agency makes rules and regulations within that area. That is to say, the agency does not legislate, rather it implements. Our courts properly impose this super-

14. BLACHLY & OATMAN, *op. cit. supra* note 11.

15. Fuchs, *supra* note 12, at 265.

16. *The Aurora*, 7 Cranch 382 (U. S. 1813); *Field v. Clark*, 143 U. S. 649 (1892); *Buttfield v. Stranahan*, 192 U. S. 470 (1904).

visory rule. It is a compelling result of two fundamental principles. First, the doctrine of the separation of powers;¹⁷ and second, the principle that each department of government, executive, legislative and judicial, being itself a delegate of governmental power, cannot delegate that power.¹⁸ Let us see briefly how the rule requiring a norm or standard in the creating statute must be imposed if these two basic doctrines are to remain a part of our legal philosophy. The statutes creating administrative bodies submit themselves to the following division, *inter alia*, (a) statutes creating power in another of the three governmental departments, for example, the National Recovery Act,¹⁹ wherein Congress, the legislative department, granted power to the President, the executive department, or the Tariff Acts,²⁰ wherein again the legislative department granted power to the executive department; and (b) statutes creating outside administrative agencies and giving them power, for example, the Interstate Commerce Act,²¹ creating the Commission of that name or the Fair Trade Act,²² creating the Fair Trade Commission. If the statute is of the (a) type, the requisite of a norm or standard must be imposed. Otherwise Congress could delegate full law-making powers to the executive as distinguished from granting him power to fill in details within a certain prescribed field. This would be a violation of the separation of powers doctrine;²³ our executive branch would be making *and* enforcing our laws. Hence, since the rule follows from the principle, the rule must remain if the principle is sound. The doctrine of separation of powers is essential to liberty. If the executive department took over the law-making function, the principle of limited powers in our legislative branches finding their origin in the people's sovereignty would not have application to the executive department and our democratic form of government would gradually be displaced by a totalitarian state, or at least one approaching that type. What is liberty? Liberty would seem to exist only in that area of law making which the people have not delegated to legislatures, state or federal, or if there has been delegation, it has not been exercised. It might be argued that the fundamental

17. MONTESQUIEU, *THE SPIRIT OF LAWS* (6th ed. 1793) 113. "When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty, if the judiciary power be not separated from the legislative and executive."

18. A free translation of the Latin maxim, "*delegatus non potest delegare.*"

19. 48 STAT. 195 (1933), 15 U. S. C. A. § 701 (1939).

20. 46 STAT. 763 (1930), 19 U. S. C. A. § 1001 (1937).

21. 34 STAT. 587 (1906), 49 U. S. C. A. § 41 (1934).

22. 52 STAT. 111, 15 U. S. C. A. § 41 (Supp. 1938).

23. MONTESQUIEU, *op. cit. supra* note 17, at 113.

concept of reserved rights in the people recognized by constitutional principles would be protected because Congress or the legislatures could only delegate those powers which they had received from the people. Hence, the executive could go no further in legislative action than Congress. True, in constitutional principle, he *could* not, but *would* he? This argument ignores the principle and practice of congressional debate and deliberation protected by parliamentary rules and productive of better results than the hurried and arbitrary decrees of one individual. The check of deliberation is generally present in democracies. It is not present in dictatorships. The contention may be advanced that the Supreme Court could intervene if the executive were to transgress the Constitution. This is to suspend the liberty of the people during the period of enforcement before the Supreme Court acts. Moreover, it would permit the executive to initiate legislation, rather than to propose it, thereby sacrificing the legislative curb on the executive and relying wholly upon judicial action. The legislative check is more efficacious, in that it is preventive, while the judicial is only curative. The legislature which has not abdicated to the executive can refuse to enact legislation; the judicial department can only tell the legislature that it *should have* refused to pass the given statutes.

Montesquieu's doctrine of the separation of governmental powers has been the subject of a great deal of interpretation. Even as early as *The Federalist*, James Madison contended that the French statesman meant not that there should be no *partial* overlapping, but that one department of government should not *wholly* enter another. Montesquieu's primary consideration was the preservation of liberty; if liberty were to be lost by the abandonment of a legislative check upon the executive in one field, then to that extent liberty would be impaired and the loss would have been caused by failing to keep governmental powers separate. This would have violated Montesquieu's doctrine. It would seem that Montesquieu argued not merely against an entire overlapping of departmental powers, but also against a partial invasion.²⁴ Have our courts permitted the abdication by the legislative to the executive department? To some extent they have. It must be conceded that to some extent the Madisonian theory has been followed in practice. This judicial leniency is certainly no indication of usurpation or judicial imposition of rigid adherence to the doctrine of separation of powers or unnecessary impairment of the efficiency of administrative bodies by the judiciary.

24. *Id.* at page 119: "As the executive power has *no other part* in the legislative than the privilege of rejecting, it can have no share in the public debates." *Id.* at page 118: "But should the legislative power usurp a *share* of the executive, the latter would be equally undone. . . ." (Italics inserted).

It has also been argued that Montesquieu's doctrine is a political theory and not a mandatory legal doctrine.²⁵ The inference is that he advanced it as a matter of governmental theory, not as a basis for judicial action in the event of its violation. In other words, if we concede that it is excellent political theory to keep the executive, legislative, and judicial branches separate, then that is as far as we need to go to be in perfect accord with Montesquieu. This contention seems to be debatable. He knew that the judicial department must have sanctioning power upon the violation of this separation.²⁶ Of what avail would it be to provide that the legislative and executive departments be kept separate unless we created a third department and empowered it to say that the separation had been ignored and to invalidate the action which violated the separation?

If the statute is of the (b) type, wherein a special commission is created, the argument that there must be a norm or guide is usually based upon the Latin maxim, *delegatus non potest delegare*. Of course, if the administrative agency created is looked upon as being in the executive branch of government, the prohibition against separation of powers may also be resorted to in attacking the statute. But generally the prohibition against delegating delegated powers seems more applicable in this type of statute.

That the rule requiring a norm or standard to be present in the creating statute follows from the non-delegation principle needs but brief treatment. If there is no norm or standard contained in the statute creating the new agency, the agency in making regulations will not be merely filling in details within a prescribed area, it will actually be legislating. In this event, there will have been a delegation of *law making* power. We would then have administrative legislation, which is improper, rather than legislative administration, which is proper. The rule therefore is rendered necessary by the principle, *delegatus non potest delegare*.

The principle against delegation of legislative power is sound under our form of government.²⁷ The reasons for its soundness are largely similar to those underlying the doctrine of separate powers. The people in their sovereignty may delegate law making power, but the delegate is not thereby impowered to redelegate. The people in their delegation rely upon their chosen delegates, and would be most unsafe in their reliance

25. O'Reilly, *Administrative Absolutism* (1938) 7 FORDHAM L. REV. 310, 317.

26. MONTESQUIEU, *op. cit. supra* note 17, at 118: "But, in general, the legislative power cannot try causes; and much less can it try this particular case, where it represents the party aggrieved, which is the people."

27. See discussion in DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW* (1927) 15-18.

if the delegate could redelegate to another, not chosen by the people. The courts are certainly reasonable in preserving this principle, and they have adopted a reasonable rule to attain this end.

This discussion of these general concepts seems appropriate in dealing with judicial supervision over administrative rule-making, but it does not give a complete answer to our question of whether the courts have usurped power in their intervention at this first step in the administrative process, to wit, a consideration of the validity of the creating statute. To make our answer more complete, it is well to turn to more minute rules and to the cases construing them.

There are, speaking from the norm or standard point of view generally, two types of creative administrative statutes: (a) the statute which gives specific conditions under which the administrative officer or board may act or refuse to act,²⁸ and (b) the statute which leaves the rule-making or deciding within the discretion generally of the administrative agency without specifying any guides as to the use of that discretion.²⁹ The (a) type of statute certainly is in conformity with the rule requiring that the creative statute contain a norm or standard. What have our courts done, when the (b) type of statute appears, on the question as to whether it conforms to the norm or standard rule?

We must divide our cases into classes in answering this question. The division of cases is largely dependent upon the type of enterprise or business sought to be controlled by the creating administrative statute involved in the case. The following division of cases wherein uncontrolled administrative discretion was granted seems fairly comprehensive: (1) cases presenting statutes giving administrative control over businesses or enterprises which are not permeated with possible danger to public safety, health or morals;³⁰ (2) cases presenting statutes giving administrative control over businesses or enterprises which have inherent in them possible danger to public safety, health or morals;³¹ (3) cases

28. In *Buttfield v. Stranahan*, 192 U. S. 470, 494 (1904), the statute involved provided in § 1, thereof, that "to import or bring into the United States any merchandise as tea which is inferior in purity, quality, and fitness for consumption to the standards provided in Section 3 of this act, and the importation of all such merchandise is hereby prohibited."

29. *People ex rel. Lieberman v. Van De Carr*, 199 U. S. 552 (1905); *Hays v. Poplar Bluff*, 263 Mo. 516, 173 S. W. 676 (1915). See Patterson, *Ministerial and Discretionary Official Acts* (1922) 20 MICH. L. REV. 848, 882.

30. *State v. Coleman*, 96 Conn. 190, 113 Atl. 385 (1921); *Park Hill Development Co. v. Evansville*, 190 Ind. 432, 130 N. E. 645 (1921); *Seattle v. Gibson*, 96 Wash. 425, 165 Pac. 109 (1917).

31. *Houston v. St. Louis Independent Packing Co.*, 249 U. S. 479 (1919); *Illinois State Board of Dental Examiners v. People*, 20 Ill. App. 457, *aff'd*, 123 Ill. 227, 13 N. E. 201

presenting statutes giving administrative control over mere privilege;³² (4) cases wherein the subject matter sought to be controlled renders it impracticable or impossible to prescribe a norm or standard to guide the discretion of the administrative agency;³³ (5) cases wherein the jurisdiction to act administratively is dependent upon a condition subsequently arising.³⁴

It is to be noted that in each classification named, we are dealing with the (b) type of statute, which grants unguided discretion to the administrative agency. How have our courts applied the rule requiring a norm or standard in each classification? Have they usurped judicial power or unnecessarily interfered with the efficacy of administrative bodies?

In the first classification we have cases wherein the business or enterprise is perfectly lawful and wherein, because of the subject matter sought to be controlled, the statute could prescribe specifications to guide the administrative agency. Our courts have adopted the rule that, in this class, a statute giving totally unguided discretion does not conform to the rule requiring that the creating statute have a norm or standard. However, in the next three classes of cases, namely, cases involving statutes granting uncontrolled administrative discretion concerning matters within the police power of the state, cases involving statutes granting similar discretion over matters constituting mere privilege, and cases wherein the subject matter sought to be controlled by the statute renders it impracticable or impossible to guide administrative discretion, our courts have held that these statutes, containing no guide as to exercise of this discretion, are valid. This has been done by judicially incorporating into the statute the requisite of "reasonableness".³⁵ The judiciary has repeatedly held that the legislatures contemplated that the use of discretion granted, not expressly controlled

(1887); *People v. Grant*, 126 N. Y. 473, 27 N. E. 964 (1891); *People ex rel. Copcutt v. Board of Health*, 140 N. Y. 1, 35 N. E. 320 (1893).

32. *Packard v. Banton*, 264 U. S. 140 (1924). The court wrote: "... a distinction must be observed between the regulation of an activity which may be engaged in as a matter of right and one carried on by government sufferance or permission." *Id.* at 145. It is universally recognized that there is (in the case of a license to exercise a mere privilege) no element of property right or vested interest of any kind. Being so, it may be a necessary consequence that rules of law, protective of vested rights, are without influence in respect of such a privilege.

33. *Hall v. Geiger-Jones Co.*, 242 U. S. 539 (1917); *Gaylord v. Pasadena*, 175 Cal. 433, 166 Pac. 348 (1929); *Milwaukee v. Rissling*, 184 Wis. 517, 199 N. W. 61 (1924).

34. *Field v. Clark*, 143 U. S. 649 (1891); *Hampton v. United States*, 276 U. S. 394 (1928).

35. *Union Telegraph Co. v. Richmond*, 224 U. S. 160 (1911); *Ex parte Holmes*, 187 Cal. 640, 203 Pac. 398 (1921).

by any guide, was intended to be controlled by the use of reason on the part of the administrative agency.³⁶ The courts thereby eradicated any intention on the part of the legislature to grant the use of arbitrary power to the administrator. In other words, when there was any excuse or justification for the legislative omission of a norm, such as the statutes involving police power, granting mere privilege or dealing with a subject matter rendering the stating of a norm impracticable, the courts have stepped in and saved the statute by furnishing, themselves, the norm of reasonableness. Is this usurpation of power? In the first classification, where the legislature could incorporate specifications and the statute deals with a business or enterprise which an individual has a right to engage in, it certainly is safer to require a legislature, seeking to impose restrictions upon a legitimate business through an administrative agency, to *expressly* prevent arbitrariness.

Let us look at decided cases under each classification. Probably the most common example of our first division, the control of a perfectly lawful business or enterprise, is found in the public speaking cases.³⁷ The right to free speech is constitutionally guaranteed.³⁸ Its statutory restriction should be carefully scrutinized. Its control by statute through an administrative agency does lend itself to specific guides which could be enacted into the creating statute. The administrator under the statute might be empowered to refuse permission to assemble where there is danger of rioting or the probability of the dissemination of doctrines advocating anarchy. The granting of unguided discretion controlling the privilege to speak in a public place has been held invalid under our norm or standard rule.³⁹ Yet this same form of statute has been upheld upon the ground that it is to be placed under the privilege classification and that therefore the statute needs no express norm or standard.⁴⁰ The operation of steam engines within a city has been held to come within the first classification and require a stated norm or guide, controlling discretion.⁴¹ The use of the city streets for parade purposes has been held to come under this classification. Hence a statute granting unregulated discretion was held invalid.⁴²

36. *Smith v. Cahoon*, 283 U. S. 553 (1931); *Continental Baking Co. v. Woodring*, 286 U. S. 352 (1932); *Gorieb v. Fox*, 274 U. S. 603 (1927).

37. *Davis v. Mass.*, 167 U. S. 43 (1896); *Hague v. Committee for Industrial Organization*, 83 L. Ed. 928 (June 5, 1939); *State v. Coleman*, 96 Conn. 190, 113 Atl. 385 (1921).

38. U. S. CONST. Amendment I.

39. *State v. Coleman*, 96 Conn. 190, 113 Atl. 385 (1921).

40. *Davis v. Mass.*, 167 U. S. 43 (1896); *Hague v. Committee for Industrial Organization*, 83 L. Ed. 928 (June 5, 1939).

41. *Baltimore v. Radecke*, 49 Md. 217 (1878).

42. *Frazee's Case*, 63 Mich. 296 (1886).

In our police power cases,⁴³ we find statutes containing no norm or guide regulating administrative discretion, but the statutes were sustained by the judicial implication of reasonableness.⁴⁴ Such statutes granted control over the sale of meat,⁴⁵ over the sale of milk,⁴⁶ over the storage of gasoline,⁴⁷ over the erection and maintenance of hospitals,⁴⁸ and over the use of the streets by automotive transportation companies.⁴⁹

In the privilege cases (requiring no norm in the creative statutes other than the vesting of discretion) there are such examples as, statutes granting unregulated control over theatres and motion picture films,⁵⁰ over the practice of medicine,⁵¹ over the storage of gasoline,⁵² over making speeches in public places.⁵³ The statutes here were saved by the judicial implication of "reasonableness," to modify the discretion granted.

Under the class of cases presenting statutes where the express statement of a norm would be impracticable or impossible, we find authorities wherein statutory control through administrative delegation is sought over theatres and motion picture films,⁵⁴ over admission to the practice of medicine,⁵⁵ over entry into the laundry business,⁵⁶ over insurance rates,⁵⁷ over fire escapes on certain types of buildings,⁵⁸ over licenses for teachers,⁵⁹ dentists,⁶⁰ doctors,⁶¹ and employment agencies.⁶² It is to be noted how impossible it would be to expressly state the norm or

43. See excellent discussion in Sigler, *The Problem of Apparently Unguided Administrative Discretion* (1934) 19 ST. LOUIS L. REV. 261.

44. *Buffalo v. Hill*, 79 App. Div. 402, 79 N. Y. Supp. 449 (4th Dep't 1903).

45. *Ibid.*

46. *People ex rel. Lieberman v. Van De Carr*, 175 N. Y. 440, 67 N. E. 913 (1903), *aff'd*, 199 U. S. 552 (1905).

47. *San Antonio v. Rubin*, 42 Fed. (2d) 107 (C. C. A. 5th, 1930).

48. *Blackman v. Atlanta*, 151 Ga. 507, 107 S. E. 525 (1914).

49. *Lane v. Whitaker*, 275 Fed. 476 (D. Conn. 1921).

50. *Oakley v. Richards*, 275 Mo. 266, 204 S. W. 505 (1918).

51. *Douglas v. Noble*, 261 U. S. 165 (1923); *Dillard v. Board of Medical Examiners*, 69 Colo. 575, 196 Pac. 866 (1921).

52. *Matter of Larkin v. Schwab*, 242 N. Y. 330, 151 N. E. 637 (1926).

53. *Davis v. Mass*, 167 U. S. 43 (1896).

54. *Mutual Film Corp. v. Ohio Industrial Comm.*, 236 U. S. 230 (1915).

55. *Mathews v. Murphy*, 23 Ky. L. 750, 63 S. W. 785 (1901).

56. *Yee Bow v. Cleveland*, 99 Ohio 269, 124 N. E. 132 (1919).

57. *State v. Whitman*, 196 Wis. 472, 220 N. W. 929 (1928). See PATTERSON, *THE INSURANCE COMMISSIONER IN THE UNITED STATES* (1927) 389, 340, 406.

58. *Plymouth Coal Company v. Pennsylvania*, 232 U. S. 531 (1914).

59. *People v. Flanigan*, 347 Ill. 328, 179 N. E. 823 (1932).

60. *People v. Kettles*, 221 Ill. 221, 77 N. E. 472 (1906).

61. *Dillard v. State Board of Medical Examiners*, 69 Colo. 575, 196 Pac. 866 (1921).

62. *McBride v. Clark*, 101 N. J. L. 213, 127 Atl. 550 (1925).

guide controlling administrative discretion in these cases. There are so many considerations, many of which are unforeseeable, which would be material for the administrator when considering the fitness of an applicant for a license to practice medicine, dentistry, or conduct an employment bureau, that to attempt to regulate his discretion by detailed legislative prescriptions would be impossible. To attempt to do so would be to deprive the administrator of that elasticity of discretion essential to his work. The only restriction necessary to prevent arbitrariness is that imposed by the court, that is, "reasonableness."

From the few examples given above it appears that our courts have placed similar cases in different classifications. As appears in the preceding paragraphs, the rule requiring an express norm or standard more definite than unguided discretion has been applied by some courts to statutes regulating theatres and motion pictures. On the other hand, statutes controlling upon theatres and motion pictures have been classified under the privilege rule, resulting in the judicial implication of reasonableness as the norm or standard to be satisfied. This is an indication of greater willingness on the part of some courts to grant administrative freedom than prevails in others. A reading of these cases would delight the realist who argues that the court first decides and then, by *ex post facto* reasoning, justifies his decision. One does suspect that the court has unstated reasons for its actual decision and places the case in one class or the other because of its decision, rather than from a close study as to which class the case really belongs.

There remains the last division in the five classifications of cases, wherein the courts have presented the problem as to the validity of a statute creating an administrative agency in which the statute contains no regulation of the discretion granted. In this division we have cases wherein the administrative agency is granted jurisdiction upon the appearance, subsequently, of a stated fact or condition.⁶³ The statutes of this type leave to the agency the task of deciding whether or not the stated fact or condition has arisen. It is within the discretion of the agency to decide whether or not that fact or condition has arisen. The rule is that if the legislative body makes the law, the mere fact that its application is dependent upon a fact or condition subsequently found to exist by an administrator, will not invalidate the statute, even if unguided discretion is left to the administrator.⁶⁴

Two leading United States Supreme Court cases are illustrative of

63. *The Aurora*, 7 Cranch 382 (U. S. 1813); *Field v. Clark*, 143 U. S. 649 (1891); *Hampton v. United States*, 276 U. S. 394 (1928).

64. The rule seems to have been first announced in *The Aurora*, 7 Cranch 382 (U. S. 1813).

this type of administrative delegation. In *Field v. Clark*,⁶⁵ Congress delegated work to the President as an administrative officer. A federal statute was passed which imposed certain stated duties on certain imported products, but the specified duties were not to be imposed unless the foreign country shipping these specified products to the United States levied unequal duties upon products of the same nature shipped from this country to their shores. To the President was delegated the duty of ascertaining whether or not the foreign country levied such unequal duties.⁶⁶ Here, the President was given some discretion, which the statute left uncontrolled. He necessarily had to determine whether or not the goods were of the same nature and whether the reciprocal duties were unequal. His discretion was unguided by the statute. The Supreme Court sustained the statute. The second case is *Hampton v. United States*.⁶⁷ Herein was presented to the court the question as to the validity of the flexible clause in the Tariff Act of 1922. By the terms of that Act, the President was empowered to raise or lower the duty on certain stated commodities so as to equalize the cost of producing the article abroad, plus the cost of shipping it to this country with the cost of producing the article here. In other words Congress had fixed the standard by which the tariff was to be arrived at; it was to be sufficient to equalize the cost of production for sale in this country. For example, if the cost of production in a foreign country became so low that when the cost of production abroad plus the cost of transportation plus the present tariff imposed here enabled the foreign producer to undersell our domestic producer, the duty had to be raised. But even though Congress had generally fixed the tariff at an amount sufficient to equalize cost for sale here, it had granted to the President the widely discretionary field of ascertaining cost here and cost abroad. The statute left this to his unguided discretion, not stating what considerations should control him in ascertaining cost. The Supreme Court sustained this statute. In each case the Supreme Court held that Congress had made a law, the *application* of which *only* was left to the President upon his deter-

65. 143 U. S. 649 (1891).

66. See discussion in Sigler, *loc. cit. supra* note 43.

67. 276 U. S. 394 (1928).

The *Field* case and the *Hampton* case are easily distinguishable from *Panama Refining Co. v. Ryan*, 293 U. S. 388 (1935), in that if the statutory condition subsequent specified in the former two cases arose the administrative agent *had* to act; his discretion lay only in deciding that the condition subsequent had occurred. In the *Panama Refining Co.* case, the administrative agent was authorized to act if the condition subsequent occurred. He might or might not act and no norm or guide was given as to when he should and when he should not act. The Supreme Court properly invalidated the creating statute in *Panama Refining Co. v. Ryan*.

mining subsequently that a stated fact or condition had arisen. But in each instance and particularly in the *Hampton* case, the President was given a wide and unguided discretion. Did the court usurp power or impede the efficiency of administrative action in these cases?

Before leaving the question as to the extent to which our courts have intervened in dealing with the validity of statutes creating administrative bodies, it would be well to consider briefly some rules closely related to those already discussed.

Thus far we have been considering state statutes dealt with by state courts, and federal statutes considered by federal courts. Suppose a case involving a state statute goes through the state courts and an appeal is taken to the United States Supreme Court on a constitutional issue. What questions will be considered by our Supreme Court? If a state court has decided that a statute has a sufficient norm or standard, the Supreme Court will be bound by the construction given by the state court to its own statute.⁶⁸ Even if there is no construction of the state statute by the state court, the mere absence of a norm or guide which might permit arbitrariness is not a federal question.⁶⁹ The Supreme Court is not concerned with unrestricted delegation by a state legislature or the violation of the principle of the separation of powers *within a state*. The only federal jurisdiction present when a state administrative statute is attacked is to be found either in the "due process" clause or the "equal protection of the laws" clause of the Fourteenth Amendment.⁷⁰ Under these rules then, it will be of no avail for a party attacking a state administrative statute in a federal court to assail its lack of norm and *possible* arbitrariness. He must show that in its *operation* he has been deprived of property without due process of law or has been denied equal protection of the law. Abstracts from three well-known United States Supreme Court cases will illustrate the difference between two cases where there is no federal jurisdiction and one where it is present. In *Gundling v. Chicago* the court wrote:

"It seems somewhat doubtful whether the plaintiff in error is in a position

68. *Gundling v. Chicago*, 177 U. S. 183 (1900); *Reetz v. Michigan*, 188 U. S. 505 (1903); *Plymouth Coal Co. v. Penn*, 232 U. S. 531 (1914); *Gorich v. Fox*, 274 U. S. 603 (1927).

69. *Gundling v. Chicago*, 177 U. S. 183 (1900).

70. *Plymouth Coal Co. v. Penn*, 232 U. S. 531 (1914).

Of course it must be observed that if the state administrative statute clashes with any other restrictions imposed by the Federal Constitution on state authority, these restrictive clauses will be recognized and applied by the Supreme Court. For example, an administrative statute offending the *ex post facto* or impairment of contract clauses of the Federal Constitution would be held unconstitutional. *Crowell v. Benson*, 285 U. S. 22 (1932) and *Gundling v. Chicago*, 177 U. S. 183 (1900).

to raise the question of the invalidity of the ordinance because of the alleged arbitrary power of the mayor to grant or refuse it. He has made no application for a license, and of course the mayor has not refused it. *Non constat*, that he would have refused it if application had been made by the plaintiff in error. Whether the discretion is arbitrary or not would seem to be unimportant to the plaintiff in error so long as he has made no application for the exercise of the discretion in his favor and was not refused a license."⁷¹

More definite is the statement appearing in *Plymouth Coal Company v. Pennsylvania* wherein the court wrote:

"We may once more repeat, what has so often been said, that one who would strike down a state statute as violative of the Federal Constitution must show that the alleged unconstitutional feature *operates* so as to deprive him of rights protected by the Federal Constitution."⁷²

In these two cases the Supreme Court denied itself jurisdiction when an administrative statute was attacked because the attack was based upon only *possible* arbitrariness. But in *Yick Wo v. Hopkins*⁷³ where an ordinance (granting unguided discretion) prohibited the operation of a laundry in other than brick buildings without a permit, the testimony adduced in the state court made it clear that the ordinance *in operation* had denied equal protection of the law to Chinese residents of San Francisco. The court sustained the party attacking the statute in operation. The distinction is apparent. In the *Gundling* and the *Plymouth* cases there was the mere *grant* of arbitrary power involved and that does not present a federal question. But in the *Yick Wo* case, the arbitrary power had been *exercised*; that does present a federal question. Equal protection of the law had been denied in the *Yick Wo* case.

If a state statute, not involving any delegation of power to an administrative body, were to deny equal protection of the law or deprive a person of property without due process of law the United States Supreme Court would hold it unconstitutional. Certainly it cannot be soundly, or even seriously, argued that administrative delegation should cast a protecting shroud about legislation which in operation denies equal

71. 177 U. S. 183, 186 (1900).

It seems clear that cases such as these are merely applying the federal rule in constitutional law set down in *Massachusetts v. Mellon*, 262 U. S. 447 (1923) that the party who invokes the judicial power of the Supreme Court "must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." *Id.* at 488. *Cf.* *United States v. Butler*, 297 U. S. 1 (1936).

72. 232 U. S. 531, 544 (1914).

73. 118 U. S. 356 (1886).

protection of law or deprives a person of property without due process. When our federal courts step in only upon these constitutional grounds, can they truthfully be said to usurp power or interfere unnecessarily with the proper functioning of state administrative bodies?

Lastly, and probably most demonstrative of the judicial spirit of non-interference, there is the rule that the court will not substitute its own judgment for that of the legislature or the administrative agency in passing a rule or regulation.⁷⁴ The courts do not, and in theory cannot, concern themselves with the policy of the statute or correctness of the conclusion of the administrative board in passing a regulation or in deciding an issue after a hearing. That the court would have legislated differently will not alone furnish a basis for interference.⁷⁵

The Validity of the Administrative Regulation

In the previous section we were concerned with the question—has the legislature attempted to delegate too much power to the administrative body? In this section the problem is—has the administrative agency attempted to assume too much quasi-legislative authority? For purposes of discussion the cases permit of the following division: (a) cases wherein the question is as to whether the agency in passing a particular regulation has gone beyond the scope canalized by the statute;⁷⁶ (b) cases wherein the problem is whether the regulation is a reasonable one, having in mind the intention of the legislature in enacting the creating statute;⁷⁷ and (c) cases wherein the regulation raises a problem of constitutionality.⁷⁸

(a) *Has the agency exceeded its power?* This question arose in *MacMillan v. Railroad Commission of Texas*,⁷⁹ *In re Mellea*,⁸⁰ and *Waite v. Macy*.⁸¹

In the *MacMillan* case, a state statute authorized the Railroad Commission of Texas to make rules and regulations to conserve oil and pre-

74. *Southern Pacific Co. v. Campbell*, 230 U. S. 537 (1913); *Louisville & Nashville Ry. v. Garrett*, 231 U. S. 298 (1913); *Spring Valley Water Works v. San Francisco*, 82 Cal. 286, 22 Pac. 910 (1890).

75. *San Diego Land & Town Co. v. National City*, 174 U. S. 739 (1899).

76. *Waite v. Macy*, 246 U. S. 606 (1918); *In re Mellea*, 5 F. (2d) 687 (E. D. Mich. 1925); *MacMillan v. Railroad Commission*, 51 F. (2d) 400 (S. D. Tex. 1931).

77. *Universal Battery Company v. United States*, 281 U. S. 580 (1930); *McCaughn v. Hershey Chocolate Co.*, 283 U. S. 488 (1931).

78. *Ohio Valley Water Company v. Ben Avon Borough*, 253 U. S. 287 (1920); *St. Joseph Stockyards v. United States*, 298 U. S. 38 (1936).

79. 51 F. (2d) 400 (S. D. Tex. 1931).

80. 5 F. (2d) 687 (E. D. Mich. 1925).

81. 246 U. S. 606 (1918).

vent its physical waste. The statute expressly excepted any economic control from the jurisdiction of the commission. The commission passed a regulation restricting the oil output to a specified number of barrels per acreage unit. The regulation ignored the number of wells driven. In other words, a producer with a tremendous investment due to the number of wells driven in one twenty acre unit was restricted to the same output as a producer who had a much smaller investment in a similar sized unit. The commission's purpose was to control production and thereby control price. The court in holding the regulation invalid wrote:

"In the light of such long established policy and of the language of the oil conservation statute itself, excluding from the statutory definition 'economic waste,' we think it plain that whether the Legislature could lawfully have exercised this power, either directly or through delegation of it to the commission, it has not only confided the exercise of it to the commission, but has flatly withheld such power from it. In short, we believe that the orders in question are unreasonable and void as to plaintiffs because issued in the attempted exercise, not of delegated, but of usurped powers. As usurpations, under the authority of the statutes of Texas authorizing this suit, we strike them down."⁸²

It will be noted that the court held the regulations in question void, because they were beyond the scope of power given to the commission under the enabling statute.

In the *Mellea* case, the United States Labor Department had passed a regulation requiring those filing notices of intention to become citizens to file therewith certificates of arrival. This regulation was made under the general provision of the Naturalization Laws giving the Secretary of Labor "power to make such rules and regulations as may be necessary for properly carrying into execution the various provisions of this act."⁸³ The court, in holding the regulation to be beyond the scope of authority entrusted to the Secretary of Labor, said:

"... yet nowhere is there any requirement nor suggestion (nor language from which such a requirement or suggestion can be inferred) that a declaration of intention must be accompanied by a so-called certificate of arrival or by any other document or instrument in order to entitle the alien presenting such declaration to have it filed."⁸⁴

Here the court also turned to the rule of unreasonableness to strike down the regulation.

82. *MacMillan v. Railroad Commission*, 51 F. (2d) 400, 405 (S. D. Tex. 1931).

83. 34 STAT. 606 (1906); 8 U. S. C. A. § 356 (1934).

84. *In re Mellea*, 5 F. (2d) 687, 689 (E. D. Mich. 1925).

In the *Waite* case, a statute prohibited the importation of tea which was found to be inferior in "purity, quality and fitness."⁸⁵ The statute created a Tea Board and empowered it to enforce the provisions of the statute by appropriate regulations. The Board made a regulation whereunder any tea having coloring in it would be rejected. The plaintiff's tea had coloring matter in it, known as "prussian blue." It was shown that this was not deleterious to the quality of the tea. It further appeared that the tea was above the minimum standard of tea as required by samples kept by the Board. The court in holding the regulation void wrote:

"... but it is equally true that the board cannot enlarge the powers given to it by statute and cover a usurpation by calling it a decision on purity, quality or fitness for consumption."⁸⁶

In connection with this rule prohibiting administrative bodies from usurping power not granted to them, a few related decisions have been made announcing the rule that the administrative agency may not by regulation change or alter the provisions of the parent statute creating it.⁸⁷ This would seem to be a detailed application of the general rule against usurpation. Certainly the agency may not take upon itself the power to change the creating statute.⁸⁸

(b) *The unreasonable regulation rule.* The courts have decided that any administrative regulation which is unreasonable is void.⁸⁹ The reasoning generally is that, if the regulation is under all the circumstances void, the legislature never intended to grant administrative power to pass it.⁹⁰ This rule, in the light of the reason behind it, would seem to be a part of the general rule discussed in (a) just preceding. The rule of unreasonableness was applied in *Universal Battery Company v. United States*⁹¹ and *McCaughn v. Hershey Chocolate Co.*⁹²

In the *Universal Battery Company* case an administrative regulation

85. 35 STAT. 163 (1908); 21 U. S. C. A. § 41 (1934).

86. *Waite v. Macy*, 246 U. S. 606, 608 (1918).

87. *Manhattan General Equipment Co. v. Commissioner of Internal Revenue*, 297 U. S. 129 (1936).

88. *Koshland v. Helvering*, 298 U. S. 441 (1936).

89. *International Railway Co. v. Davidson*, 257 U. S. 506 (1922); *Universal Battery Co. v. United States*, 281 U. S. 580 (1930); *McCaughn v. Hershey Chocolate Co.*, 283 U. S. 488 (1931); *Edison Storage Co. v. United States*, 67 Ct. Cl. 543 (1929). See Wetach, *Labor Law Administration in Pennsylvania* (1922) 70 U. OF PA. L. REV. 277, 293 *et seq.*

90. *United States v. Shreveport Grain & Elevator Co.*, 287 U. S. 77 (1932).

91. 281 U. S. 580 (1930).

92. 283 U. S. 488 (1931).

passed by the Internal Revenue Bureau under Section 900 (3) of the Internal Revenue Act was attacked for alleged unreasonableness. Subdivision (3) of Section 900 taxed parts and accessories of motor vehicles, *inter alia*. The Internal Revenue Bureau defined parts and accessories as articles primarily adapted for use on motor vehicles. Occasional use otherwise would not prevent it from being an accessory and individual use infrequently as an accessory would not make it such. In holding the regulation reasonable the court wrote:

"Certainly it would be unreasonable to hold that articles equally adapted to a variety of uses and commonly put to such uses, one of which is in motor vehicles, must be classified as parts or accessories for such vehicles and it would be also unreasonable to hold that articles can be so classified only where they are adapted solely for use in motor vehicles and are exclusively so used."⁹³

In the *Hershey* case a subdivision of Section 900 of the Internal Revenue Act placed a tax on "candy" and the Bureau defined candy as "sweet chocolate and sweet milk chocolate, whether plain or mixed with fruit or nuts" and excluded from the tax all sweet chocolate which obviously would not be consumed in the condition or form in which it was sold, such as large chocolate animals. The reasonableness of this regulation was attacked. The court in upholding the regulations as reasonable considered (1) the age⁹⁴ of the regulation (12 years), and (2) the fact that Congress had re-enacted the Revenue Act after this regulation had been in force for some time and did not amend the act in any way to change this existing administrative regulation.⁹⁵

(c) *Constitutionality*. The administrative absolutists become genuinely lachrymose in their cry of judicial usurpation in this field.⁹⁶ The two decisions which cause particular lamentation are *Ohio Valley Water Company v. Ben Avon Borough*⁹⁷ and *St. Joseph Stock Yards Co. v. United States*.⁹⁸ Suffice to say that both cases are rate cases and that the Supreme Court in each case refused to be bound by the factual administrative findings as to the value of property in fixing a fair return. In the *Ben Avon* case the findings of fact made by the Public Service Commission of Pennsylvania were to be final⁹⁹ under the statute, and

93. *Universal Battery Co. v. United States*, 281 U. S. 580, 583 (1930).

94. *McCaughn v. Hershey Chocolate Co.*, 283 U. S. 488, 492 (1930).

95. *Id.* at 492 and 493. *Koshland v. Helvering*, 298 U. S. 441 (1936); *United States v. Shreveport Grain and Elevator Co.*, 287 U. S. 77 (1932).

96. See Landis, *Administrative Policies and the Courts* (1938) 47 YALE L. J. 519; Cooper, *Administrative Justice and the Role of Discretion* (1938) 47 YALE L. J. 577; Cheadle, *The Delegation of Legislative Functions* (1918) 27 YALE L. J. 892.

97. 253 U. S. 287 (1920).

98. 298 U. S. 38 (1936).

99. See *Ohio Valley Company v. Ben Avon Borough*, 253 U. S. 287, 289 (1920).

likewise the factual findings of the Secretary of Agriculture in the *St. Joseph Stock Yards* case were given statutory finality.¹⁰⁰ Was the court correct in refusing to be bound by the finding as to value when the issue of confiscation of property was raised?

Rate-making is legislative action;¹⁰¹ hence the function of an administrative board in fixing rates is quasi-legislative.¹⁰² The findings of fact by a legislature prior to the passage of a statute are accorded a presumption of correctness and this is true whether the legislature is acting itself or is active through an administrative agency.¹⁰³ But if a legislature passes a statute directly which deprives a person of property without due process or denies equal protection of the laws, the court will strike it down and will examine the factual set-up sufficiently to ascertain whether or not there is unconstitutionality. The court will do likewise where the legislature acts through an administrative body. A legislature cannot save its action from judicial scrutiny by delegating to an administrative body and providing in the creating statute that the actions of that body shall be free from judicial review.¹⁰⁴ The extreme administratists do not argue against the jurisdiction of our courts to strike down for unconstitutionality. They rather contend that our courts are reaching out too far to find unconstitutionality; that going behind administrative findings of fact to find unconstitutionality is judicial usurpation.¹⁰⁵ But to admit that a court may strike down for unconstitutionality and then to deny the court the power to examine into the facts to ascertain whether there is unconstitutionality is mere verbiage. How can a court discover unconstitutionality or the lack of it unless it looks into certain factual questions inherently involved in the very issue it has before it.¹⁰⁶ For instance, in this rate-making field, if there has been confiscation there is unconstitutionality and the court has jurisdiction. But the only issue under the claim of confiscation is one of proper valuation. If the court is precluded from going into valuation, it is prevented from passing upon confiscation and hence unconstitutionality may escape judicial condemnation. The court is certainly correct in penetrating attempted administrative finality when a "constitutional" fact is in issue. How empty would be the principle that our courts may invalidate confiscatory legislation or regulation if we

100. See 298 U. S. 38, 51, 52, 82 (1936).

101. See *Prentis v. Atlantic Coast Line*, 211 U. S. 210, 226 (1908).

102. *St. Joseph Stockyards Co. v. United States*, 298 U. S. 38 (1936).

103. *Id.* at 51.

104. *Ibid.*

105. Landis, *loc. cit. supra* note 96.

106. See *St. Joseph Stockyards Co. v. United States*, 298 U. S. 38, 52-53 (1936).

are to deny the court the privilege of ascertaining whether confiscation has or will occur under the attacked legislation or regulation.

The argument¹⁰⁷ of the dissenting opinion in the *St. Joseph Stockyards* case, drawing an analogy from the finality of jury verdicts before appellate courts, seems unsound. The argument is that if the findings of fact of non-expert jurymen may be effectively made final and binding upon appellate courts, certainly the factual findings of expert administrators may be rendered conclusive. There is no analogy between a jury verdict and the factual finding of an administrative body. The verdict of a jury may meet with judicial supervision at three points during the course of the trial. At the end of the plaintiff's case upon a motion to dismiss the court must decide whether there is at least a question of fact to go to the jury on the elements essential to make out a prima facie case; secondly, the court must pass upon the question as to whether there is anything to submit to the jury on a motion to direct a verdict; and thirdly, when the motion to set the verdict aside is made, the court passes upon the question as to whether the jury's verdict is *contrary to the weight of the evidence*. The factual findings of an administrative body are subject to no judicial supervision until they are brought over into the judicial realm.

Another Supreme Court decision has caused wide discussion and comment and most of it has been adverse. In *Crowell v. Benson*¹⁰⁸ a workmen's industrial commission had under statutory authority granted an alleged employee a compensation award because of injuries sustained by that employee. The jurisdiction of the commission depended upon the existence of the relationship of employer and employee. The Supreme Court held that the judiciary was not bound by the finding of the commissioner on the issue of the existence of this relationship and should ascertain the presence of this "jurisdictional" fact itself. Two distinguishing characteristics of the *Crowell* case should be mentioned. First, the function of the administrative agency was quasi-judicial, rather than quasi-legislative. It is mentioned here because it is commonly associated with the *Ben Avon* case and the *St. Joseph Stock Yards* case in attacks upon decisions of the Supreme Court relative to administrative law questions. Secondly, it does not raise a question of constitutionality, it rather raises a question which would be more appropriately considered under subdivision (a), *i.e.*, action by an agency which is beyond the scope of its authority. In this case the Supreme Court holds that not only is the judiciary empowered to examine for usurpation of power by an administrative body, but that the judiciary may make its own

107. See 298 U. S. 38, 73 (1936), Brandies, J., concurring.

108. 285 U. S. 22 (1932).

findings of fact in so far as the existence of essential jurisdictional facts is concerned. The decision to this extent is sound. It would again be an empty principle which would allow the judiciary to invalidate a regulation or order which was beyond the scope of authority granted to the issuing agency if the judiciary was to be bound by the conclusions of fact arrived at by the agency which are material in the establishment of the existence of the required jurisdiction.

It is difficult to find judicial usurpation when our courts protect the individual from the regulation of an administrative agency which (a) is beyond its power to make, (b) is unreasonable or (c) is unconstitutional. If the judiciary isn't empowered to do this and to break through administrative fact finding to do it adequately, there is no check upon an unscrupulous or political commission.

The Procedure in Enacting an Administrative Regulation

This last division in the process of making an administrative regulation or order submits itself to three outstanding questions. Does proper procedure in arriving at administrative quasi-legislation require that there be (1) a hearing, (2) findings, (3) promulgation?

(1) *The necessity of a hearing.*¹⁰⁹ When an administrative body is performing an adjudicative function, it is the general rule that a hearing must be afforded in determining his rights.¹¹⁰ For instance, when a person claiming to be a citizen is brought before a commission of the labor department on deportation charges, that commission is acting in an adjudicative capacity and the defendant is entitled to a hearing.¹¹¹ But our subject matter concerns itself with the making of administrative regulations binding upon unnamed and in many instances, at the time of the regulation, parties unknown to the administrative body. It is the general judicial, as distinguished from statutory, rule that no hearing

109. See Goodnow, *Private Rights and Administrative Discretion* (1916) 41 A. B. A. REP. 408; Pillsbury, *Administrative Tribunals* (1923) 36 HARV. L. REV. 405; Note, *The Necessity of a Notice and Hearing in Administrative Determinations* (1931) 50 U. OF PA. L. REV. 96; (1935) 8 SOUTHERN CALIF. L. REV. 330. See also, DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW* (1927) cc. I, V; FREUND, *POLICE POWER* 1904 §§ 520-528; MOTT, *DUE PROCESS OF LAW* (1926) 226.

110. *Londoner v. Denver*, 210 U. S. 373 (1908); *Norwegian Nitrogen Products v. United States*, 288 U. S. 294 (1933); *Hagar v. Reclamation*, 111 U. S. 701 (1884); *Nickey v. Mississippi*, 292 U. S. 393 (1934); *Kuntz v. Sumption*, 117 Ind. 1, 19 N. E. 474 (1889); *Copcutt v. Yonkers*, 140 N. Y. 1, 35 N. E. 320 (1893).

111. *United States v. Ju Toy*, 198 U. S. 253 (1905); *Chin Yow v. United States*, 203 U. S. 8 (1908). Further, it is argued that the issue of citizenship must have judicial determination. See dissenting opinion in *United States v. Ju Toy*, *supra*; *Moy Suey v. United States*, 147 Fed. 697 (C. C. A. 7th, 1906); *United States v. Dart*, 251 Fed. 394 (D. Ga. 1918).

is required prior to the enactment of an administrative regulation or order.¹¹² The usual judicial reasoning arriving at this rule is that since the legislature is not bound to conduct a hearing before making law itself, no hearing is essential when the legislature is acting through its administrative agent in the passing of a detailed regulation or order.¹¹³ There being no judicial requisite, most commissions until recent years conducted no hearings prior to the passage of regulations or orders. The Interstate Commerce Commission however is an exception to this practice¹¹⁴ and some larger bodies have followed its formula, for example, the Federal Trade Commission. In the so-called New Deal legislation, in many instances the statute expressly requires a hearing before the issuance of orders or regulations.¹¹⁵ For instance the Agricultural Adjustment Act as amended in 1935 expressly required hearings before the issuance of certain orders and the Bituminous Coal Act explicitly required hearings before the making of "a rule or regulation which has the force and effect of law."¹¹⁶ The Trade Agreements Act and the Federal Alcohol Administration Act also contain requisites of hearings before an order or regulation becomes effective.¹¹⁷ To some extent these statutory requisites are thought to be due to the decision of the United States Supreme Court in the *Panama Refining* case.¹¹⁸

Certainly there has been no judicial usurpation or interference with administrative efficiency in this area. The administrative agencies voluntarily, at first, and then under statutory compulsion have gone much further than the rules imposed by the judiciary required. The admin-

112. *Murray's Lessee v. Hoboken Land Co.*, 18 How. 272 (1885); *Buttfield v. Stranahan*, 192 U. S. 470 (1904); *Bi-metallic Investment Co. v. State Board of Equalization*, 239 U. S. 441 (1915). See Black, *Is the Test of the Reasonableness of an Administrative Determination Subjective or Objective?* (1935) 12 N. Y. U. L. Q. REV. 601, 607.

113. Feller, *supra* note 7; BLACHLY & OATMAN, *op. cit. supra* note 11. See recommendations in A. B. A., 1938 ADV. PROGRAM, 165. The proposed statute required a hearing of all parties interested.

114. Feller, *supra* note 7, at 659.

115. The various codes of the National Recovery Act provided for hearings. The Agricultural Adjustment Act provided for hearings. See § 8c of the Agricultural Adjustment Act, as amended, 49 STAT. 753 (1935), 7 U. S. C. A. § 608 (c) (1939). The Bituminous Coal Act provides that "no rule or regulation which has the force and effect of law, shall be made or prescribed by the Commission, unless it has given reasonable public notice of a hearing, and unless it has afforded to interested parties an opportunity to be heard, and unless it has made findings of fact." 50 STAT. 72 (1937), 15 U. S. C. A. § 829 (1939). See also the Federal Alcohol Administration Act, 49 STAT. 977 (1935), 27 U. S. C. A. 201 (Supp. 1938); the Trade Agreements Act, 48 STAT. 945 (1934), 19 U. S. C. A. § 1354 (1937).

116. Note 115, *supra*.

117. *Ibid.*

118. *Panama Refining Co. v. Ryan*, 293 U. S. 388 (1935); Feller, *supra* note 7, at 660.

istrative bodies followed the example of the legislature in conducting hearings pending the enactment of important legislation.

We now have commissions granting hearings voluntarily¹¹⁹ and under statutory compulsion¹²⁰ before putting an order or regulation into effect and others neglecting to do so. In some instances our commissions and legislatures felt a hearing was requisite and in others it was neglected or considered and deemed unnecessary. There necessarily arises the question as to when a hearing is essential in this area. The Administrative Law Committee of the American Bar Association in its reports for 1937¹²¹ and 1938¹²² thought a hearing should be a general requisite. But there are practical difficulties in this connection. In order that the requisite of a hearing mean anything, it must contemplate that parties interested be given reasonable notice of the time and place of that hearing.¹²³ When an administrative agency is performing an adjudicative function, the parties interested are known or can be somewhat easily ascertained. This is not true where the agency is about to make a general regulation affecting many people in the future. Suppose, for instance, a regulation was being proposed affecting farmers, could all farmers be notified? It would be impossible and because of the great numbers, the holding of such a meeting would result in such disorder and confusion as to prohibit progress.¹²⁴ If an interested group was organized and had authorized representatives, the requisite of a hearing with its concomitant reasonable notice would be practicable in so far as that group is concerned.¹²⁵

Another serious difficulty might lie in determining who are interested parties. Some might be directly interested, but the interest of others might be very economic, even though indirect.¹²⁶ Suppose a farmer who is desirous of obtaining a subsidy is about to be ordered to cultivate only twenty-five percent of his acreage, isn't the vendor of farm machinery interested indirectly?

119. National Labor Relations Boards are granting hearings voluntarily.

120. Note 115, *supra*.

121. A. B. A., 1937 ADV. PROGRAM, 183-186.

122. A. B. A., 1938 ADV. PROGRAM, 165 for the proposed Act.

123. Fuchs, *loc. cit. supra* note 12. Professor Fuchs in discussing the question of procedure in administrative rule-making submits the following considerations: "(1) the character of the parties affected; (2) the nature of the problems to be dealt with; (3) the character of the administrative determination; (4) the types of administrative agencies exercising the rule-making function; and (5) the character of enforcement which attaches to the resulting regulations."

124. Note 123, *supra*.

125. See discussion in Jaffe, *Law Making by Private Groups* (1937) 51 HARV. L. REV. 201.

126. Note 123, *supra*.

The character of the parties affected is most important on this question of a hearing when a quasi-legislative function is being exercised by a commission. In some instances the hearing plan is feasible. For example, in the Interstate Commerce Commission the requisite of a hearing can be complied with. The Commission is dealing with large transportation companies who are now registered with it. They are known to the commission and they are organized and represented. The same is true of the Fair Trade Board and the Commission acting under the Pure Food and Drugs Act.

Another practical difficulty is the tremendous added burden upon administrative bodies with its resulting increased governmental expense. To take one department for example—if the various commissions in the Treasury Department were compelled to conduct hearings before issuing every order, the additional governmental expense would be tremendous.

In *Morgan v. United States*¹²⁷ the Supreme Court decided that the Secretary of Agriculture could not properly sign an order fixing maximum rates when he had not heard or read testimony or heard the arguments. They held substantially that he who decides must hear. This rule, if it applies to commissions and it seems that it should,¹²⁸ would serve to increase the work and expense since one administrator would be confined to one job.

The difficulty of a general requisite of hearings in this field is apparent. It might be well to leave the matter in the discretion of the great number of smaller agencies. Their discretion might be guided by (1) the possibility of giving notice of time and place, (2) the number to be affected, (3) the organization of the various groups, (4) the possibility of equitable proceeding by parties affected restraining enforcement pending judicial action, (5) the expertness of the administrative body, rendering unnecessary the viewpoint of laymen in formulating rules.

(2) *The Necessity of Findings*.¹²⁹ By the expression "necessity of findings" is meant the necessity of arriving at and expressly stating in the form of report, memorandum or decision the conclusions of fact which the agency has found to be present.

Upon first examination of the recent cases on this question, one meets with apparently hopeless confusion. It might be profitable to suggest certain possible lines of distinction. Before doing this, a brief glance at the earlier phase of the law may be of assistance. Two distinctions seem to have been fairly well established until the Supreme Court handed down four recent decisions. One distinction established the rule that

127. 304 U. S. 1 (1938).

128. Feller, *supra* note 7, at 663.

129. See (1935) 19 MINN. L. REV. 763; (1936) 49 HARV. L. REV. 827.

findings would be required where a special newly created agency was functioning,¹³⁰ but would not be a requisite where an executive officer, such as the President or a cabinet member, was the administrative agency.¹³¹ This classification was based upon the presumption that the executive officer had complied with the statutory confines imposed upon him and that the facts necessary for his jurisdiction were present.¹³² The court intimated that a different rule would apply where the action of a special commission was in question.¹³³ The other established distinction was between the quasi-judicial and quasi-legislative functions of an administrative body. The rule required findings when the action was quasi-judicial but not where the action was quasi-legislative.¹³⁴ Have these distinctions been adhered to in four recent decisions—*Panama Refining Co. v. Ryan*,¹³⁵ *United States v. Baltimore & Ohio R. R.*,¹³⁶ *Pacific States Box & Basket Co. v. White*,¹³⁷ and *Morgan v. United States*?¹³⁸

In the *Panama Refining Co.* case we see the first instance of a breaking down of the two distinctions just mentioned. Section 9c of the National Recovery Act authorized the President to prohibit the interstate transportation of oil produced or withdrawn from storage in excess of amounts permitted by state law. The statute required no findings and none was made by the President prior to the issuance of an order under this section. The court held the President's order was invalid¹³⁹ and one ground of invalidity was the fact that no findings were made. This decision ignores both of the distinctions referred to, since the order

130. *Monongahela Bridge v. United States*, 216 U. S. 177 (1910). See (1935) 19 MINN. L. REV. 763, 764: "Thus no express finding of facts that bring the act within the scope of the prescribed legislative policy is necessary, it being presumed that such facts exist."

131. *United States v. Baltimore & Ohio Ry.*, 293 U. S. 454 (1935). See note 130, *supra* at 766: "Where the delegated power is exercised by a special commission whose orders are reviewable by the courts, the desirability of complete and explicit findings is obvious, for they facilitate a determination of whether the board has well exercised its power."

132. *Monongahela Bridge v. United States*, 216 U. S. 177 (1910). See *Ekiu v. United States*, 142 U. S. 651, 660 (1892).

133. *United States v. Baltimore & Ohio Ry.*, 293 U. S. 454 (1935).

134. *Wichita Railroad & Light Co. v. Public Utilities Comm.*, 260 U. S. 48 (1922); *Mahler v. Eby*, 264 U. S. 32 (1924); *Beaumont, S. L. & W. Ry. v. United States*, 282 U. S. 74 (1930). See discussion in Feller, *supra* note 113, at 665.

135. 293 U. S. 388 (1935).

136. 293 U. S. 454 (1935).

137. 296 U. S. 176 (1935).

138. 304 U. S. 1 (1938).

139. 293 U. S. 388 (1935).

in question was an executive one, emanating from the President, and it was also legislative in character since it operated in the future and referred to no particular individual.

The *Baltimore & Ohio R. R.* case followed the trend of the *Panama* case. Involved herein was the Boiler Inspection Act which empowers the Interstate Commerce Commission to make regulations controlling equipment upon railway locomotives which constitute "peril to life and limb." The Commission conducted hearings and thereafter issued an order requiring all railway locomotives above a certain size to be equipped with power, rather than hand-reverse gears. The statute requires the Commission to make a report in writing, stating its conclusions. The Commission made a long and apparently exhaustive report, concluding with the decision that the safety of employees and travellers required the installation of the power gear. The order was declared invalid because of the lack of an express finding of facts to show specifically that the hand operated gear caused unnecessary peril to life and limb. The court wrote that "formal and precise findings are not required"¹⁴⁰ by the provisions of the Act, but this, the court said, does not "remove the necessity of making, where orders are *subject to judicial review, quasi-jurisdictional findings* essential to their constitutional or statutory validity."¹⁴¹ This decision does not follow the second distinction, to wit, between quasi-legislative and quasi-judicial functions. Here the action of the commission was quasi-legislative; yet basic findings of fact were required.

In the *Pacific States Box* case, an Oregon statute authorized the State Department of Agriculture, after investigation and public hearing, to fix and promulgate "official standards for containers of horticultural products . . . in order to promote, protect, further and develop the horticultural interests."¹⁴² The statute did not require that specific findings of fact be made.¹⁴³ The State Department of Agriculture, pursuant to authority given by the statute issued an order setting certain standards for fruit containers. The Department made no findings of fact and the Supreme Court held that no findings were necessary. While there is no stress laid upon the point in the decision, the distinction between delegation to an existing department of the executive branch of governr . . . delegation to a specially created commission seems

140. *United States v. Baltimore & Ohio R.R.*, 293 U. S. 454, at 465 (1935).

141. *Ibid.* (Italics inserted).

142. ORE. CODE ANN. (1930) § 18-2902-3, amended, ORE. CODE ANN. (Supp. 1935) § 18-3508.

143. See 296 U. S. 176, 186 (1935).

to be followed here.¹⁴⁴ Also the line of demarcation drawn between the legislative and judicial functions is followed and expressly so. The court said, "But the statute did not require special findings; doubtless because the regulation authorized was general legislation, not an administrative order in the nature of a judgment directed against an individual concern."¹⁴⁵

In *Morgan v. United States*, the Secretary of Agriculture, after hearings had been conducted, issued an order prescribing maximum rates to be charged by market agencies for buying and selling livestock at the Kansas City Stock Yards. This action was brought to restrain the enforcement of the rate order. It appeared at the trial that the Secretary had not heard or read the testimony and had not heard the arguments, that his familiarity with the case was based upon conversations had with employees in his office. It further appeared that at the end of the argument before the department examiner, after all evidence was in, counsel for the plaintiff requested that a report containing the findings of the examiner be drawn and served upon the plaintiff. This was not done. The court held that such findings were a requisite to proper procedure in this case. This decision would seem to violate each of the two distinctions discussed. Here was an order by an existing department of the executive branch of the federal government rather than by a specially created commission and the order was legislative, rather than judicial, in character.

It seems clear, from these four recent decisions, that the former distinctions have been abandoned. Is it possible to reconcile the *Pacific States Box*¹⁴⁶ case with the *Panama Refining Co.*,¹⁴⁷ *Baltimore & Ohio R. R.*,¹⁴⁸ and *Morgan*¹⁴⁹ cases and take a rule from them as to when findings are required?

There would seem to be no sound distinction founded upon the fact that a state agency was involved in the *Pacific States Box* case, whereas in the other three cases the action of a federal agency was in question. The apparent reason would seem to be that in either case the question raised would be one of due process under the Fifth or Fourteenth Amendment of the Federal Constitution. Also the principle that pro-

144. *Ibid.* The court wrote: "But where the regulation is within the scope of authority legally delegated, the *presumption* of the existence of facts justifying its specific exercise attaches alike to . . . , and to orders of administrative bodies."

145. See 296 U. S. 176, 186 (1935).

146. 296 U. S. 176 (1935).

147. 293 U. S. 388 (1935).

148. 293 U. S. 454 (1935).

149. 304 U. S. 1 (1938).

cedural requisites will be more rigidly adhered to in matters involving possible criminal punishment than in ordinary civil litigation does not assist here because a penal savor present in the *Panama Refining Co.* and *Baltimore & Ohio R. R.* cases, was also present in the *Pacific States Box* case.¹⁵⁰

Certainly the distinction between quasi-legislative and quasi-judicial functions of administrative bodies in so far as requiring findings is concerned seems to have been weakened greatly by the *Panama Refining Co.* and *Baltimore & Ohio* cases. But the *Pacific States Box* case expressly refers to the distinction.¹⁵¹ Presumably the rationale underlying this distinction is that since findings are the conclusions of fact deduced from evidence adduced at a hearing, if no hearing is essential, *a fortiori* findings are not. As previously seen, unless otherwise provided by statute, a hearing was not essential when an administrative body was acting quasi-legislatively. May we assume that findings are required where an administrative body, voluntarily or compulsorily, conducts a hearing and may be dispensed with if no hearing is conducted in cases where such boards are acting legislatively? This cannot be the rule because in the *Pacific States Box* case a hearing was, pursuant to statute,¹⁵² conducted and no finding was required. It would seem that findings would be more necessary to the judiciary where no hearing had been held. If a hearing has been held the judiciary may have a transcript of the record together with documentary proof and from these ascertain whether the action of the body was proper. But where no hearing has been held it would seem essential that there be findings at least of those conclusions of fact requisite for administrative jurisdiction.

The Supreme Court made a statement in the *Baltimore & Ohio R. R.* case which after analysis may prove helpful. The court wrote that "formal and precise findings are not required,"¹⁵³ but then went on to say that this did not "remove the necessity of making, where orders are subject to judicial review, quasi-jurisdictional findings essential to their constitutional or statutory validity."¹⁵⁴ What does the court mean by the words, "subject to judicial review"? The court certainly is not distinguishing between a review expressly authorized in the administrative statute and one permitted by a common law writ. No sound distinction is present here on the question as to whether findings shall be required.¹⁵⁵ The words "quasi-jurisdictional findings essential to their

150. See Comment, (1936) 49 HARV. L. REV. 827.

151. See 296 U. S. 176, 186 (1935).

152. *Ibid.*

153. 293 U. S. 454, at 465 (1935).

154. *Ibid.*

155. Feller, *supra* note 113, at 668.

[the orders] constitutional or statutory validity" are more helpful. The court cites *Florida v. United States*¹⁵⁶ wherein the court draws the distinction which throws some light upon the question. The distinction was there made between what may be termed quasi-jurisdictional or basic facts and a "complete statement of the grounds of the Commission's determination."¹⁵⁷ Findings as to the former were held essential; as to the latter, while findings might be desirable, they were not essential. From this point of view the fundamental test in determining whether findings shall be required would seem to be—are they requisite for proper judicial review? In the *Panama Refining Co.* case the court could not ascertain whether the basic jurisdictional facts were present without findings. It could not even determine that the President had based his action upon a belief that oil had been produced beyond the amount allowed by state law. In the *Baltimore & Ohio R. R.* case the finding required by the court was essential to show that the body had at least believed it had jurisdiction, i.e., that it believed a hand-reverse gear constituted an "unnecessary peril to life and limb,"¹⁵⁸ which was essential in order that the agency might have jurisdiction under the statute. But in the *Pacific States Box* case it was apparent when the order itself was placed parallel with the statute that the agency had jurisdiction.¹⁵⁹ The statute gave it jurisdiction to regulate fruit containers and that is all that the order accomplished. That findings must be present when necessary for a proper judicial review would seem generally to be the court's rule. Certainly the courts are not unnecessarily impairing the efficiency of administrative bodies in imposing this requisite.

(3) *The necessity of promulgation.* The term is used here to mean the publication of administrative orders. In this respect this country has been, and still is, exceedingly laggard. In England as far back as 1890 administrative rules were required to be published.¹⁶⁰ In 1893 the English Rules Publication Act was passed.¹⁶¹ But in the United States it was not until the National Recovery Administration, the Agricultural Adjustment Administration, and other New Deal agencies showered the country with administrative regulations and orders that we finally saw

156. 282 U. S. 194 (1931).

157. 282 U. S. 194, at 215 (1931).

158. See 293 U. S. 454, at 463 (1935).

159. It is interesting to note that in the other three cases, the *Morgan*, *Panama Refining Company*, and *Baltimore & Ohio R.R.* cases, there was at least one other ground given for holding the administrative action void.

160. See discussion in Griswold, *Government in Ignorance of Law—A Plea for Better Publication of Executive Legislation* (1934) 48 HARV. L. REV. 193; see also Legis. (1936) 49 HARV. L. REV. 1209; 44 GEO. WASH. L. REV. 268 (1936).

161. 56 & 57 Vict. c. 66 (1893).

the need of some systematic publication. On July 26, 1935, the Federal Register Act was approved. The first issue of the Federal Register appeared on March 14, 1936.¹⁶² The American Bar Association through its Special Committee on Administrative Law in its reports has continuously pleaded for this reform¹⁶³ and has incorporated this requisite in proposed federal administrative law legislation.¹⁶⁴

The Federal Register Act applies only to federal legislation. The myriad rules and regulations annually enacted by the multiple state and municipal boards are still not published systematically. True the more important agencies do voluntarily publish their regulations in leaflet or pamphlet form.¹⁶⁵ The need for such publication is evident when a citizen does not know of the existence of a regulation until he is notified and probably punished for its violation. The legal presumption of knowledge of the law is rendered more ridiculous than ever when it is applied against a citizen who could not learn even of the existence of the particular "law."

If systematic publication of administrative regulations cannot be had in the various states, the public might be apprised by requiring legislative approval of all, or the more important administrative regulations before they could become effective.¹⁶⁶ In this way the act of the legislature would be recorded in the usual way and this record would sufficiently form the basis for the presumption of legal knowledge if it didn't actually apprise the lawyer or the citizen. That some state legislation on this subject is needed must be conceded even by the most vigorous administrative absolutist.

Conclusion

From the foregoing collection of cases and materials it would seem that an impartial unbiased mind would conclude that our courts have neither impinged upon the administrative domain nor have they unnecessarily retarded the progress of administrative bodies. If accomplishment whether right or wrong is the zenith of administrative action, then justice based upon fundamental principles, drawn from the natural law intuitive in everyone, is to be disregarded. Our courts have recognized the necessity of government by administrative action in several

162. See comment by Stason, *THE LAW OF ADMINISTRATIVE TRIBUNALS* (1937) 420 *et seq.*

163. (1934) 59 A. B. A. J. 552-555.

164. A. B. A. J., 1938 Adv. PROGRAM, 164-6.

165. The Workmen's Compensation Commissions and the Boards of Health do, in the larger communities, publish new regulations.

166. This has been suggested as an effective check upon administrative regulations. See BLACHLY & OATMAN, *op. cit. supra* note 11, at 82-88.

fields. Their co-operative attitude from the outset is evidenced by the legal inventions—quasi-legislative and quasi-judicial—which were created in order that administrative regulations might survive. Any further judicial abdication would be most hazardous and result in increased disrespect for law and authority. The contemptuous victor as well as the victimized loser would lose respect for law and order. It is well that we keep judicial integrity, knowledge and sapience on its present front in administrative law. It has retreated far enough in the interest of mere speed.